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No. 85-1343 (3)

In The

Supreme Court of the United States

October Term, 1985

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MARK A. HUMPHREY and FRED J. HAAS
d/b/a HUMPHREY & HAAS,

Appellants,

v.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,

Appellee.

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On Appeal from a Judgment of the Iowa Supreme Court

—o—

MEMORANDUM OF APPELLEE AND MOTION TO AFFIRM COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION

—o—

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QUESTION PRESENTED

MAY THE STATE PROHIBIT THE USE OF DRAMATIZATIONS REGARDING LAWYER TELEVISION ADVERTISING ON THE BASIS THAT DRAMATIZATION FACILITATES APPEALS TO THE EMOTIONS, PREJUDICE, LIKES OR DISLIKES OF THE VIEWING PUBLIC AND INHIBITS THE EXERCISE OF AN INTELLIGENT OR RATIONAL DECISION-MAKING PROCESS IN DETERMINING THE NEED FOR AND CHOICE OF AN ATTORNEY.

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I.

REQUEST FOR PLENARY CONSIDERATION

Appellee hereby requests the Court to grant jurisdiction and give plenary consideration to this appeal.

Statement in Support of Plenary Consideration

This case presents to the Court a case of first impression involving the power of a State to regulate certain techniques employed in lawyer electronic medium advertising. While the Court has heretofore set the parameters of lawyer print advertising,[1] it has consistently excluded electronic medium advertising from its holdings.[2] As a result thereof the States have adopted varying and sometimes conflicting rules regarding electronic medium regulation.[3] Appellee joins with Appellant and requests the Court to grant plenary consideration to this appeal.

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[1] Bates vs. State Bar of Arizona, 433 U.S. 350 (1977); In Re: R.M.J., 455 U.S. 191 (1982); and Zauderer vs. Office of Disciplinary Counsel, 471 U.S. —, 105 S. Ct. 2265; 85 L.Ed. 2d 652 (1985).

[2] Bates vs. State Bar of Arizona, 433 U.S. 350 at 384 (1977); in Re: R.M.J., 455 U.S. 191 at 201 fn. 13 (1982); Zauderer vs. Office of Disciplinary Counsel, 471 U.S. —; 85 L.Ed. 2d 652 at 687 fn. 1 (1985); and Bolger vs. Youngs Drug Products Corp., 463 U.S. 60 at 74 (1983).

[3] For example, New Jersey's Rule 7.2 prohibits dramatizations, music, drawings, animation or lyrics; West Virginia's DR 2-101(B) prohibits any use of the electronic medium; Ohio's DR 2-101(C) prohibits subjectively self-laudatory advertising; and Wyoming's DR 2-101(B) prohibits television advertising.

II.

MOTION TO AFFIRM

In the alternative Appellee moves the Court to affirm the decision of the Iowa Supreme Court.

Statement In Support Of Motion To Affirm

Iowa Code of Professional Responsibility DR2-101 (A) and (B) does not prohibit the use of the electronic broadcast medium by lawyers wishing to engage in advertising. It seeks, however, to regulate certain methods or tools of persuasion employed in commercial radio and television advertisements. Dramatizations and emotional appeals targeting the prejudice, likes or dislikes of the viewing public are regulated as being contrary to the articulated state interest that the public exercise an intelligent or rational decision making process in determining the choice of an attorney.[4]

Iowa DR 2-101(A),[5] in pertinent part, states:

"A lawyer shall not, on the lawyer's own behalf or that of a partner, associate or any other lawyer affil-

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[4] The concept of intelligent and rational decision-making in the determination of the need for legal services and the selection of a particular lawyer has been judicially recognized in Bates vs. State Bar of Arizona, 433 U.S. 350 (1977), In Re: R.M.J., 455 U.S. 191 (1982); and Ohralik vs. Ohio State Bar Association, 436 U.S. 447 (1978). This state interest was formally adopted by Iowa as the basis for its Rule in the Comments to DR 2-101 as evidenced in Trial Exhibit 3. At the trial of this case, former Iowa Supreme Court Justice Robert Allbee testified that in adopting the Rule, the Iowa Supreme Court felt that it was necessary that the public exercise an intelligent or rational decision making process in determining the choice of an attorney. To facilitate this goal the public should have objective informative data rather than the dramatic, persuasive or promotional type of commercial appeal. Trans. 95.

[5] Appendix D. p. 58a.

iated with the lawyer or the lawyer's firm, use, or participate in the use of any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory or unfair statements, which contains any statements or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, or likes or dislikes of a person or which contains any claim that is not verifiable; . . ."

In addition to the prohibition against appeals to the emotion, DR 2-101 (B)[6] makes the following regulation regarding the use of certain electronic medium techniques:

" . . . The same information, in words and numbers only, articulated only by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio. The same information, in words and numbers only, articulated by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated by television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer."

History Underlying DR 2-101(A) and (B)

This case presents to the Court a complete factual record, not only with respect to the appellants' violation of the rule in question, but also regarding the factual or "legislative history" underlying the Rule.

DR 2-101 (A) and (B) seek not to prohibit the use of the electronic medium, but to regulate the potential for its abuse. The rule seeks to prohibit the use of certain tools or techniques that have been identified as causing abuse of the electronic medium. The tool or advertising technique in question is television dramatization.

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6 Appendix D. p. 58a.

As a result of the Court's holding in *Bates vs. State Bar of Arizona,* 433 U.S. 350 (1977) the Iowa Supreme Court directed the Committee on Professional Ethics and Conduct of the Iowa State Bar Association, as a Commission of that Court, to conduct hearings regarding lawyer advertising. On December 13, 1979 a hearing was held and expert testimony was taken regarding the state interest sought to be furthered by lawyer advertising, the potential for abuse from certain advertising techniques and the extent of any regulation regarding the use of those techniques. Thereafter the Iowa Supreme Court, en banc, at a public hearing, received the Committee's recommendation, the testimony introduced before the Committee and additional briefs and arguments from the public. After due deliberation, the Iowa Supreme Court promulgated DR 2-101 (A) and (B). A transcript of that hearing was introduced into evidence during the trial of the case at Bar, identified as Trial Exhibit 16a.[7]

Factual Basis for Regulation

In its holding upon remand, the Iowa Supreme Court articulated three bases for its decision in upholding the prohibition upon television dramatization: the potential for abuse as indicated in the Committee hearings, the fact that as contrasted from the print media, electronic medium

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[7] Trial Exhibit 16a. Likewise, for a detailed factual recitation regarding the procedure and background of the Rule, see Rapp and Gillium vs. Committee, 504 F. Supp. 1092 (D.C. Iowa 1980).

advertising tolerates less deliberation, and the pervasiveness of the medium.[8]

1. Potential for abuse: emotion and dramatization.

With respect to the potential for abuse, the Court relied upon the expert testimony produced before the Committee and later the Iowa Supreme Court regarding the media itself.[9] As indicated in Trial Exhibit 16a, the Committee received the expert testimony of Leonard J. Howe, executive director of Iowa Broadcasting Network. Mr. Howe testified that while there are dangers in any advertising, there are more dangers in the area of professional advertising.[10] Regarding television, Mr. Howe testified that while the element of imagination is removed (as compared to radio) motion and all of the elements of drama are added " . . . so it is the ultimate in the dramatic or emotional form of the media".[11] Mr. Howe further testified that while all three forms of communication—print, radio and television—can be abused, television, because it has more elements of drama is the most abused.[12]

2. Potential for abuse: immediacy of the medium.

Abuse of media was further found due to the immediacy of the medium and the design of the commercials in question. The Iowa Supreme Court found that:

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8 Opinion, Appendix B, pp. 31a-32a.

9 Opinion, Appendix B, pp. 31a-32a.

10 Trial Exhibit 16a, p. 62.

11 Trial Exhibit 16a, pp. 67-68.

12 Trial Exhibit 16a, p. 70.

> "Electronic media advertising, when contrasted with printed advertising, tolerates much less deliberation by those at whom it is aimed. Both sight and sound are immediate and can be elusive because, for the listener or viewer at least, in a flash they are gone without a trace. Lost is the opportunity accorded to the reader of printed advertisements to pause, to re-study, and to thoughtfully consider."[13]

This finding is accorded support not only in the factual testimony underlying the Rule,[14] but also by the Court in *Columbia Broadcasting System vs. Democratic National Committee*, 412 U.S. 94 (1973).

When the immediacy of the electronic medium was coupled with the design of the Appellant's commercials, the Iowa Supreme Court found the antithesis of rational decision-making. During the trial of this case, one of the members of Appellant's lawfirm, with some measure of experience in television broadcasting, admitted that the design of the commercials was to "prompt the viewer to make a phone call immediately".[15] The commercials were further designed so that when the advertisement "was flashed on the screen with the phone number, and the phone number repeated twice, that was designed, I believe, to promote those individuals to write it down or even better grab the phone and make a call."[16]

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13 Opinion, Appendix B, pp. 29a, 31a.

14 Opinion, Appendix B, pp. 31a-32a.

15 Opinion, Appendix B, pp. 31a-32a. Likewise, see testimony of James Gritzner, Trans. 48-49.

16 Testimony of James Gritzner, Trans. 49.

3. Potential for abuse: pervasiveness of the medium.

Finally, the Iowa Supreme Court based its holding upon the effects of the ubiquitous and pervasive nature of the medium itself. The holding finds support in the Court's holding in *Columbia Broadcasting System vs. Democratic National Committee,* 412 U.S. 94, 128 (1973):

> " . . . The captive nature of the broadcast audience was recognized as early as 1924, when Commerce Secretary Hoover remarked at the Fourth National Radio Conference that 'the radio listener does not have the same option that the reader of publications has—to ignore advertising in which he is not interested—and he may resent its invasion of his set.' As the broadcast media have become more pervasive in our society, the problem has become more acute."

Likewise, in *Federal Communications Commission vs. Pacifica Foundation,* 438 U.S. 726, 748 (1978) the Court echoed it's earlier pronouncement in *Columbia:* . . . "the broadcast media have established a uniquely pervasive presence in the lives of all Americans".

These concepts were likewise the subject of expert testimony during the hearing on the rule. As stated by the Iowa Supreme Court[17] "One expert witness explained: ' . . . You are watching a television program. The ad is there. It intrudes upon your area of visibility, and forces itself upon you, but a print ad is not the same way.' "

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17 Opinion, Appendix B, p. 32a; Trial Exhibit 16a, p. 43.

"Special Problems" of the Electronic Medium

As indicated previously, the Court has consistently singled out the electronic medium for eventual special consideration with respect to regulations regarding lawyer advertising. However, as it concerns lawyer advertising, no definitive ruling exists regarding the nature of the "special problems" posed by this medium of communication. The Court in issuing its presage with respect to the electronic medium, has referenced several cases, a review of which becomes essential to an understanding of the "special problems" connected with the use of the electronic medium.

In reviewing prior Supreme Court decisions regarding the electronic medium, two factors emerge, each formulating a basis for regulating the use and content of the electronic medium: first, accessibility and secondly, the ubiquitous and pervasive nature of the medium itself.

Unlike the print media, the electronic broadcast medium has been subject to less First Amendment protection. It is the inherent differences between the media that justify the distinction in regulation. The accessibility of print media for communication is relatively unlimited as compared to the limited availability and accessibility of the electronic medium.[18] Accessibility, consequently, has been a basis for control over the use of the medium it-

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[18] National Broadcasting Company vs. United States, 319 U.S. 190 (1943).

self,[19] and, the content of broadcast under the "fairness doctrine".[20]

Control, both over the use of the medium as a whole, as well as the content of programming and advertisement, has been based upon the ubiquitous and pervasive nature of the broadcast medium. In *F.C.C. vs. Pacifica,* 438 U.S. 726 (1978) the Court, based its decision upholding the Federal Communication Commission's order regulating the time of broadcast of comedian George Carlin's infamous "dirty word monologue", upon the fact that television, unlike all other media "confronts the citizen, not only in public, but also in the privacy of the home where the individual's right to be left alone plainly outweighs the First Amendment."[21]

While "the short, though regular, journey from mail box to trash can [may] be an acceptable burden, at least so far as the Constitution is concerned",[22] with respect to the recipient of unwanted direct mail advertisements, the ubiquitous and invasive nature of electronic medium are not so easily controlled.[23]

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19 National Broadcasting Company, supra, regarding the use of chain network transmission.

20 Red Lion Broadcasting Co. vs. Federal Communications Commission, 395 U.S. 367 (1969), and Columbia Broadcasting System, Inc. vs. Democratic Nat. Committee, 412 U.S. 94 (1973), regarding political advertising.

21 438 U.S. at 747.

22 Bolger vs. Youngs Drug Products Corp., 463 U.S. 60 (1983).

23 Columbia Broadcasting System vs. Democratic Committee, 412 U.S. at 128.

Audience captivity has formulated the basis for prohibition or regulation in areas other than the electronic medium. In *Consolidated Edison vs. Public Service Commission,* 447 U.S. 530 (1980), the Court stated:

> "Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech. Passengers on public transportation, see, Lehman v. Shaker Heights, 418 U.S. at 307-308, 41 L. Ed. 2d 770, 94 S. Ct. 2714 (Douglas, J. concurring in judgment), or residents of a neighborhood disturbed by the raucous broadcasts from a passing sound truck, cf. Klovacs v. Cooper, 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448, 10 ALR 2d 608 (1949), may well be unable to escape an unwanted message." 447 U.S. at 542.

Perhaps the most significant restriction of the use of the electronic medium for advertising, and the most analogous to the case at Bar, concerns 15 U.S.C. 1335 declaring it:

> " . . . unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."

The statute, and its legislative history, is important with respect to the case at Bar inasmuch as the Court, in excluding the electronic broadcast medium from its general holding in *Bates*[24] referred to *Capital Broadcasting Co. vs. Mitchell* (1971 D.C. Dist.), 333 F. Supp. 582, aff'd 405 U.S. 1000, and aff'd without op *National Association of Broadcasters vs. Kliendienst,* 405 U.S. 1000 (1972).

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[24] Bates vs. State Bar of Arizona, 433 U.S. 350 at 384.

In Capital Broadcasting, an action was brought to enjoin the operation of 15 U.S.C. 1335 prohibiting the use of television in cigarette advertising. The court found that as a result of the factual information available to Congress, a rational basis existed for a statute prohibiting the use of the electronic medium with respect to cigarette advertising.

The action of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association, as Commissioners of the Iowa Supreme Court, with respect to regulating lawyer television advertising, is not unlike that of Congress in regulating cigarette advertising. As with Congress in the cigarette advertising context, a potential harm to the public from the use of television as an advertising media was identified. Like Congress in the cigarette advertising context, the Committee conducted hearings and identified a potential harm to the public from the unrestricted use of television as an advertising medium with respect to lawyer advertising. However, unlike Congress, the Committee chose not to create an outright prohibition on the use of the electronic medium. It limited its regulation to only those techniques that were essential for abuse of the medium . . . dramatization.

It is submitted that the Committee had before it ample evidence, in the form of expert testimony, of the potential for abuse of the electronic medium. Mr. Roy Follett and Mr. Leonard J. Howe, two individuals whose expertise remains unchallenged, alerted the Committee to the fact that television, because it has more elements of drama, is the most abused of the three medium—print, radio and television.[25]

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[25] Trial Exhibit 16A, p. 70.

The testimony of Mr. Follett and Howe, finds corroboration in *Kinter*[26]:

> "Misrepresentation can occur not only directly and indirectly through verbal and written statements, but also through pictorialization and characterization. One may be scrupulously honest with words and still be fostering deception by means of pictures and sketches that insinuate or blatantly present a falsehood.
>
> The range of pictorial deception is potentially as wide as the whole gamut of false advertising and perhaps more dangerous. The printed word speaks to the mind, it asks a potential customer to believe a claim. A picture 'proves' to the mind, through the eye, the validity of that claim."

If the State has a legitimate interest in facilitating the process of intelligent selection of lawyers, and to assist in making legal services fully available[27] then it must be allowed to promulgate rules designed to foster that interest. Such was the case with the Congressional enactment of 15 U.S.C. 1335 regarding cigarette advertising, and 18 U.S.C. 2512(1)(c)(ii) prohibiting the advertising of electronic devices for use in surreptitious interception of communications. Unlike those statutes, DR 2-101 seeks not to prohibit the use of the medium completely, but only to eliminate the techniques essential for abuse of the medium.

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26 *A Primer on the Law of Deceptive Practices,* MacMillan Pub. Co., 1971, p. 347.

27 Bates, 433 U.S. at 377.

CONCLUSION

Appellee submits that a sufficient factual basis exists in the record to support the finding by the Iowa Supreme Court that television commercials that appeal solely to the emotions, likes or dislikes of the viewing public are contrary to the policy of rational decision-making in the determination of the need for legal services and the choice of an attorney, that dramatizations facilitate such abuse, and that the least intrusive method of regulation is not to prohibit access to the medium, but to eliminate the tool for abuse . . . dramatization.

Appellee respectfully requests the Court to affirm the decision of the Iowa Supreme Court.

State supreme courts and lawyer disciplinary bodies need constitutional guidance regarding electronic medium lawyer advertising. This case presents the Court with an unresolved issue of national importance, an adequate factual basis for the Rule in question, as well as an extensive record regarding the effect of the operation of the rule. Appellee joins Appellant and requests that the Court grant plenary consideration to the appeal, or in the alternative to affirm the judgment.

Respectfully submitted,

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